Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-534

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 169, INTERNATIONAL ASSOCIATION OF MACHINISTS AND LOCAL LODGE 2369, INTERNATIONAL ASSOCIATION OF MACHINISTS,
Petitioners,
v.
OXCO BRUSH DIVISION OF VISTRON CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 169, International Association of Machinists and Local Lodge No. 2369 of the said Association, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

None of the opinions delivered in the courts below have been reported, officially or unofficially. There are appended hereto copies of the opinions of the United States Court of Appeals for the Sixth Circuit (App. A, *infra*, pp. A-1-A-10), and denying the present petitioners' petition for a rehearing (App. B, *infra*, p. A-11), and the opinions of the Court of First Resort, the United States District Court for the Middle District of Tennessee: Memorandum Decision and Order denying a stay of the suit pending arbitration (App. C, *infra*, pp. A-12-A-13), and its Memorandum regarding motions for a new trial and for judgment N.O.V. (App. D, *infra*, pp. A-14-A-32).

JURISDICTION

The judgment sought to be reviewed was entered June 9, 1976; the petition for rehearing was denied on July 20, 1976; and this petition for certiorari was timely filed within 90 days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The questions are presented within this framework: A non-union led 6-day wildcat strike over disciplining employees who left work to vote in a presidential primary election was followed by extreme employee hostility toward union endeavors to persuade them to return to work and by an employee demand that the employer give them a written guarantee of "amnesty" as a condition to their return. The collective bargaining agreement provided, in addition to the customary grievance system, a special declaratory judgment type provision requir-

ing the employer, upon union request, to arbitrate issues as to the proper interpretation of the contract.

The following questions arise in an action for breach of the no-strike clause brought against the union Local Lodge existing in the plant where the employees struck, the union District Lodge serving that and other Local Lodges, and the union Grand Lodge, given executive and judicial power over all Local and District Lodges:

1. Regarding mandatory final and binding arbitration—

(A) Do federal labor policy and statutes require that the action for damages be stayed pending arbitration when the union has actually invoked declaratory judgment arbitration to interpret the no-strike clause to determine whether it prohibited the Local Lodge's officers and shop stewards and the Superior Lodges' salaried employees from taking particularly described actions to end the strike?

(B) Is an arbitration award which determines that the Local Lodge's president was not involved in leading the strike, nullifying his disciplinary suspension and awarding him back pay, (1) admissible in evidence and (2) binding upon the employer against the employer's claim that the union, through its president, participated in the strike?

2. If the union is not entitled to an arbitrator's interpretation of the no-strike clause—

(A) Does the clause (1) require union officers and stewards to remain at their work and forbid them to leave for the purpose of persuading striking employees to return to work; and (2) forbid salaried union employees to seek the employer's written assurance of "amnesty" for the stated purpose of giving the union assurance adequate to persuade the strikers to return to work?

(B) Does national labor policy forbid a union to present to the employer the angry employees' demand for written assurance of "amnesty" for striking as a condition to their return to work upon the hazard that, if the union endeavors to utilize such means to end the strike, a jury will be permitted to speculate as to whether the union officials may have had an ulterior motive of utilizing the strike to compel negotiation, though there be no evidence of any such ulterior motivation?

3. In efforts to hold a national labor organization's Grand and District Lodges liable for a strike by the membership of a Local Lodge—

(A) May representatives of the superior lodges use their own discretion and judgment gained from experience as to the best means of ending a strike they disapprove without incurring imposed liability on the theory that they should have utilized immediate discipline instead of persuasion to motivate the employees to end the strike?

(B) Do the *powers* constitutionally granted to a Grand Lodge to discipline Local Lodges and their members constitute a contractual obligation to a single employer to use such power as a possible means of ending the strike, though the strike be of such brevity as to render the actual imposition of discipline impossible under the union's constitution and under the Labor-Management Reporting and Disclosure Act of 1959?

(C) When the governing collective bargaining agreement expressly identifies a named Local Lodge of a named District Lodge as the union party with which the employer has contracted, (1) whether the Grand and District Lodges are parties to the Local Lodge's contract; and (2) whether a jury may construe the contract and determine therefrom if such superior organizations are parties to it, in the absence of extraneous evidence bearing upon the parties' intent?

4. Under federal law and under the due process requirements of the Fifth Amendment, whether the verdict of a six-member jury granting substantial damages to a corporate plaintiff should be permitted to stand in a case in which, after the district court had taken actions capable of leading jurors to believe that the court favored the plaintiff's side of the case, (1) one juror deliberated under fear that he would be punished for contempt of court for tardiness, brought about by the district court's wholly unnecessary method of handling the problem on the morning deliberations began, and (2) another juror deliberated in the hope that she might receive aid from the plaintiff for her husband in obtaining valuable employment?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 203(d) of the National Labor Relations Act, as amended, 29 U.S.C. § 173(d):

> "Final adjustment by a method agreed upon by the parties is hereby declared to be desirable method for settlement of grievance disputes over the application or interpretation of an existing collective-bargaining agreement. . . ."

2. Section 301(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 185(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

3. The Fifth Amendment and applicable provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C.

§§ 411(a)(5), 462, and 464(c), of the Labor-Management Relations Act, 29 U.S.C. § 164(b) and of Tennessee Statutes (Tennessee Code Annotated, §§ 50-208—50-210), because of their cumulative length, are set forth in the Appendix (App. E, *infra*, pp. A-33-A-35).

STATEMENT OF THE CASE

This case grew out of a wildcat strike, in which the mass of employees at Respondent's plant walked out in protest because Respondent gave warning letters to employees who had left work without permission to vote in a presidential primary election. The employees were covered by a collective bargaining agreement which created a grievance and arbitration system for the final and binding resolution of grievances. The Petitioners were organized into three separate levels of unions, the Grand Lodge, exercising the international union's executive and judicial powers between conventions, the Local Lodge existing only within the Respondent's plant, and a District Lodge, which was composed of a number of Local Lodges within different plants and which furnished salaried business representative services to Local Lodges in negotiations and arbitrations.

After the warning letters were issued, the Local Lodge's permanent negotiation and grievance committeemen feared that a walkout might occur and telephoned the District Lodge representative asking him to come to the plant and talk to management to try to avert the walkout. The District Lodge representative came and conferred in an effort to persuade Respondent's officials to ameliorate their attitude in order to prevent the feared spontaneous walkout.

The employees went on strike anyway, and Respondent obtained an anti-strike injunction, suing only the Local Lodge and representative members thereof. Respondent subsequently

amended its suit after termination of the six-day strike to sue the District and Grand Lodges for breach of the collective bargaining agreement.

Respondent utilized testimony of the Local Lodge president as to the commencement of the strike. This showed that as employees began walking out, the president sought to dissuade them inside the plant by telling them a strike would be illegal and that they should remain at work and follow the grievance procedure. He then left the plant for the purpose of trying to persuade the employees to return to work, unsuccessfully talking to some of them on Respondent's employee parking lot. Subsequently, the District Lodge representative took the Local president and committeemen before the body of striking employees, read them the no-strike clause, told them they could be discharged for striking, and directed them to return to work. The unrefuted testimony offered by both the Respondent and the Petitioners was that the employees shouted down the business representative, that some employees shouted to him that he could go to hell and take the plant manager with him, and that the congregated employees cheered this expression.

With the employees refusing to heed union instructions that they return to work, the District Lodge representative presented to Respondent a set of demands written by the employees, stating conditions for their return to work. The District Lodge representative urged Respondent to give him some concession adequate to pursuade the employees to return to work, the employees having rejected both mass appeals and individual approaches by the Local president and committeemen over the weekend. The principal demand was that Respondent give the employees a written assurance of "amnesty," against discharge for having gone out on strike. When the employer finally gave this written "amnesty," imposing suspension only on the Local Lodge's president, with reservation of the right to arbitrate such discipline, the employees returned to work.

Upon arbitration of this grievance, the arbitrator recited the fact that the Respondent did not contend any union officer other than the president had been involved in leadership of the strike, the arbitrator found the president not guilty of leading the strike, and directed his reinstatement with back pay (C.A. App., 523-536).[1] When the Petitioners sought to introduce this arbitration award in evidence as against Respondent's contentions that the Local Lodge had participated in the strike through the actions of its president and grievance committeemen, the learned District Court excluded the award from evidence and immediately instructed the jury that they should ignore any reference to arbitration or to any arbitration award (C.A. App., 261, 262).

The collective bargaining agreement contained a mandatory grievance and arbitration procedure available both to the union and the employees but without provision for employer to file grievances. However, in addition to the typical multi-step procedure for handling individual or group grievances, the contract contained the following provision:

> "In the event of a dispute between the Union and the Company regarding the proper interpretation of the provisions of this Agreement the Union shall have the right to file a grievance at Step 3 of the grievance procedure. The arbitrator's decision on any such grievance shall be limited to a determination of this issue only and shall not include compensation, damages, or other regress to any employee or the Union."
>
> (C.A. App., 497-498)

Viewing this provision as one for "declaratory judgment" arbitration, the union demanded that the company join it in arbi-

[1] "C.A. App." herein refers to the joint appendix in the Court of Appeals.

trating issues as to the proper interpretation of the no-strike clause, and Respondent refused to arbitrate. Thereupon, the union filed a petition in the District Court to stay the damage suit for breach of contract pending arbitration to determine the specific issues of contract construction, *e.g.*, whether a contract prohibited union officers to leave the plant for the purpose of trying to persuade striking employees to return to work, whether the District and Grand Lodges were bound by the terms of the bargaining agreement and whether the no-strike clause prohibited the union from seeking employer concessions as a means of persuading the employees to return to work (C.A. App., 24-39).

In the demand and in the petition, the union sought to obtain only interpretation and construction, and to stay the trial of the damage suit until after an arbitrator's interpretation had been obtained; the union did not seek any decision as to whether any of the Petitioner unions had violated the contract as interpreted nor as to whether damages had been suffered or the amount thereof. The learned District Court refused to grant the stay with the inaccurate assertion that Petitioners contended "that the Plaintiff should be required to submit the issue of whether . . . the no-strike clause of the agreement had been breached to arbitration . . ." (*infra*, p. A-12).

There was no evidence that any of the Petitioner unions had endeavored to prolong the strike, and Respondent asserted Petitioners were liable because the Local Lodge officers had left the plant at the time of the walkout and because the Respondent unions had not imposed fines or taken other disciplinary action against the striking employees. The questions presented, aside from the application for stay pending arbitration, arose primarily from the charges given and the requested charges refused by the trial court.[2]

[2] Among the requests refused were a charge that violation of a contract is the only ground of liability, that no liability can be im-

The contract recited that it was entered into between Respondent and "Local Lodge 2369, affiliated with District Lodge 169," of the International Association of Machinist and Aerospace Workers (C.A. App., 295). The signature portion contained the printed name of the international association without reference to any lodge thereof, followed by the signatures of the Local committeemen and of the District Lodge's business representative.

Two events occurred which Petitioners claimed by motion and supporting affidavits of counsel to have illegally affected the judgment of two members of the six-person jury panel, and the learned District Court did not either reject the accuracy of the affidavits or direct a factual hearing. One of these was that the District Court intentionally placed a juror in fear of possible punishment for tardiness when such public embarrassment of the juror immediately before argument and deliberations was totally unnecessary, and a second was that another juror deliberated with intention to approach Respondent's representative immediately after the trial to obtain his assistance in getting a job for her husband with Standard Oil Company of Ohio in an Alaska pipeline construction project (C.A. App. pp. 103-105, 128-129).

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posed upon a union not a party to the contract, that no liability can be imposed upon a superior labor organization on the basis of its constitution because the constitution is not a contract between that organization and the employer, and that union officials may use their discretion as to the best way to end a wildcat strike, whether by the imposition of discipline or by negotiation (C.A. App. 121-125).

REASONS FOR GRANTING THE WRIT

Every recognized reason for granting the writ exists in this case, though to different degrees with relation to different questions. Because of such differences in degree, Petitioners summarize the reasons with respect to the broad subject rather by restriction to the technical questions:

Preference for Arbitration:

Aside from damage questions, determination of breach of contract liability always involves interpretation to discover the true extent of obligations undertaken by contract, then a determination of whether breach has occurred by comparing actions with the true contractual undertaking as determined by interpretation. In refusing to defer to arbitration for determination of the interpretation aspect of liability, the Court of Appeals decided such federal question in a manner in conflict with the applicable decisions of this Court, *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, *Boy's Market, Inc. v. Retail Clerks Union. Local No. 770*, 398 U.S. 245, and *Drake Bakeries v. Local No. 50, American Bakery and Confectionery Workers International*, 370 U.S. 254, as explained by *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238.

Drake Bakeries, supra, when considered in conjunction with the decision denying a stay pending arbitration as explained in *Atkinson, supra* (particularly at pp. 244-245 of 370 U.S.), demonstrates the true rule to be that the stay in support of arbitration should be refused only where arbitration will not resolve issues in litigation; the lack of employer access to arbitration is a subsidiary rule, simply explaining, in particular cases, why arbitration in fact will not resolve issues in litigation. Where, due to the fact of the union's invocation of arbitration, it can be

said with certainty that arbitration *will* resolve issues of construction and interpretation which must be resolved to determine liability, the decision of the learned Court of Appeals was contrary to this Court's determination, in ***Enterprise Wheel & Car Corporation, supra,*** that a union is entitled to the judgment of the arbitrator for which it bargained instead of the judgment of the Court on questions of contractual construction or interpretation.

To the extent that the prior authorities may not have completely answered the questions herein raised, this case presents important issues of federal labor law which have not been resolved, but which should be resolved by decisions of this Court: (1) Whether Federal labor policy's preference for arbitration applies with full force to limited arbitration which may settle only construction issues without determining liability; and (2) Whether the support of arbitration by enjoining alternative means of settling disputes under the authority of ***Boy's Market*** *Inc., supra,* is equally available to unions to enjoin or delay the alternative of litigation as it is to employer to enjoin the alternative of striking. The latter question is partcularly important in common situations in which under ***Boy's Market*** rationale, the employer asserts (as it must) its willingness to cooperate in submitting arbitrable issues to arbitration as a condition to receiving the protection of an anti-strike "Boy's Market" injunction and then itself refuses to comply with its arbitration obligations in its endeavors to impose liability upon the union for breach of contract for the enjoined strike.

The action of the learned Court of Appeals with regard to the arbitration award actually rendered was contrary to the authority of ***Enterprise Wheel & Car Corp., supra.*** Petitioners in fact sought specific performance of such arbitration award and its establishment that the Local Lodge president did not lead the strike, by seeking to introduce the award in evidence and by seeking the charge that such award was binding upon Respond-

ent. The learned Court of Appeals, in sustaining both the rejection of the award and the District Court's charge that the jury should not consider the fact or content of such award constituted approval of the judicial nullification of the arbitration award, contrary to ***Enterprise.***

Construction of Instruments:

With the bargaining agreement indiscriminately prohibiting the employer, union and employees from engaging in strikes, slow-downs or lockouts, and providing that employees' employment could be forfeited for violation of the provision without resort to arbitration except upon the sole issue of whether the employee had joined the strike, the petitioners contended that insofar as the employees were concerned, the provision, properly construed, constituted only a waiver of their right to strike subject to the penalty of forfeiture of all benefits gained by collective bargaining. Petitioners contended a union could not be liable unless it were a party to the contract and either caused or supported the strike.

Sustaining the District Court's ruling that the contract had been breached as a matter of law, the decision of the Court of Appeals was in conflict with Judge Learned Hand's decision that when employees make common cause with fellow workmen who walk out over a grievance, such is concerted action for their mutual aid and protection (as protected by Section 7 of the Labor-Management Relations Act, 29 U.S.C. §157), in ***NLRB v. Peter Cailer Kohler Swith Chocolate Co.,*** 130 F. 2d 503. It was also in conflict with the decision of the Second Circuit Court of Appeals in ***NLRB v. Bell Aircraft Corp.,*** 206 F.2d 235, that a collective bargaining agreement cannot restrict statutory rights granted by Section 7 of the said Act. It also conflicted with this Court's decision that bargaining agreements cannot nullify statutory rights in ***Alexander v. Gardner-Denver***

Co., 415 U.S. 36, and with its determination that such contractual provisions must be construed in the light of the law under which the contract was made in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270.

Such decision by the Court of Appeals was particularly prejudicial in view of the fact that there was no abstract question of whether the contract was breached, but only questions as to whether any of the petitioner unions had breached it.

The learned Court of Appeals affirmed the District Court's action of submitting to the jury, for its construction, the issue of whether the District Lodge and the Grand Lodge were parties to the bargaining agreement, without even charging that no contractual liability could be imposed upon a union unless it were a party to the contract. Such holding is contrary to this Court's holding that the construction of written instruments is for the Court rather than the jury (except as to terms having peculiar localized meanings), in *Goddard v. Foster*, 84 U.S. 589, whose continuing vitality is supported by IV WILLISTON, CONTRACTS §616 (3d Ed.). It was further in apparent conflict with the decisions in *Mastro Plastics Corp., supra*, calling for construction in the light of Federal law, a function no jury could competently perform, and with this Court's actions in construing labor contracts as a matter of law in *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, and of all other decisions by this Court in which labor contracts have been construed.

Such decisions raise an extremely important question regarding labor-management relations which has not been, but should be decided by this Court. A mere scanning of reported cases reveals that in all national labor unions, the name of the en-

tire organization is coupled with the number of the local union to constitute the complete name of the local union. When the contract itself defines the local union by name and number as being the contracting party, it is a very serious question as to whether liability for wildcat strikes can be imposed upon every national union upon the claim that the use of such name renders the contract ambiguous and authorizes a trial court to empower a jury to place liability upon the entity apt to have the greatest financial resources.

The learned Court of Appeals also upheld the District Court's action of reciting to the jurors, from the Constitution of the Petitioner International, a list of ways in which the Grand Lodge could discipline local lodges or their members, coupled with a refusal by the District Court to charge the jury as to the provisions of the Labor-Management Reporting and Disclosure Act securing fair trial to union members, and with the District Court's refusal to charge the jury that the 6-day duration of the strike was inadequate under the law and under the provisions of the International Constitution to permit any imposition of discipline.

Petitioners assert that such action is contrary to the rationale concerning construction of instruments drawn under federal labor legislation which guided the decisions of this Court hereinbefore cited, as to merit review by this Court as an important question of federal law not yet settled by it. The approval by such one-sided charge constituted sanction by the learned Court of Appeals of a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Union Responsibility for Employee Strikes:

With the evidence having shown that every action taken by any of the petitioner unions was taken for the purpose of end-

ing rather than prolonging the strike, these questions raise most grave and important issues of federal labor law which have not been, but should be, settled by this Court.

Federal labor policy favors the restoration of peace upon the occurrence of unauthorized and unplanned strikes, and presumably favors and supports the intervention into such strikes by national and regional superior labor organizations to endeavor to bring strikes to a rapid end. If such presence may be coupled with the non-use of harsh disciplinary measures by the superior unions against the strikers, particularly in the face of expert testimony that negotiation is the only practical way to soothe the anger of such workers and to entice them to return to work, and may this be used to impose liability upon national labor organizations, then the inevitable result will be to prompt such organizations to refrain from lending their assistance when they are not parties to the contract and have undertaken no contractual obligations.

The action by the learned Court of Appeals in utilizing secondary boycott tort-law authority for the purpose of upholding the District Court's imposition of liability upon unions not parties to the contract is contrary to this Court's decisions sustaining the principle that contractual obligations cannot be imposed upon one not a party to a contract in *NLRB v. Burns Security Services*, 406 U.S. 272 and *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249.

This case therefore raises very serious questions of federal labor law which have not been but should be decided by this Court in view of the fact that the sole basis of jurisdiction is contractual breach and in view of the fact that the only theories ever known to the law for imposing liability in relation to contracts has been for breach of contract, quasi-contract, and commission of the tort of inducing breach of contract—that while third-party beneficiary contracts have long been recognized,

there has never been such a thing as a third-party contract in which two contracting parties could impose liability on a third non-consenting party. Even condonation by a superior, while adequate to impose secondary boycott tort liability, cannot be the basis of the imposition of contract liability upon a non-contracting union in the absence of a body of aider-and-abettor law applicable to civil contractual liability.

To permit a jury to speculate as to superior unions' motivations in endeavoring to end an unauthorized strike by negotiation also appears to be in conflict with the rationale of *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792. A union's defensive proof that, in the exercise of its own discretion as to the best way to end the strike, it determined to use negotiation as the only practical weapon after demands and commands to the workers had failed, should shift the burden to the sueing plaintiff to prove that the defending union's claim of motivation was false.

In this connection, there is a very serious question as to whether it can be said a union which mediates between angry strikers and the employer can accurately be said to have seized upon a strike as a means of coercing the employer to negotiate during the term of a labor contract. It is impossible for the employees' demand for "amnesty" for striking to have been the reason for their going on strike. Indeed, the Petitioners' efforts to compel them to return by telling them they could be discharged for striking was clearly the event which implanted in their minds the idea that they might lose their jobs.

When in fact, as the evidence shows without any countervailing evidence, the only effective means of persuasion was to get some concession from the employer—and the withholding of "amnesty" for several days was *the* thing that deterred the employees from returning earlier—to prohibit unions from engaging in such essential and limited emergency negotiation would in many situations destroy all union leadership and would

prevent superior unions from taking the only intelligent action they can take to end rebellious strikes.

This case, in the view taken by the courts below, also presents fundamental issues as to the nature of national and regional labor organizations confronted with an unwelcome, unauthorized, and troublesome wildcat strike—whether the national organization is an employer utilizing the services of strikers to accomplish its ends, or whether it is quasi-governmental in nature, possessing powers which it may use for its organizational purposes.

A mandate that every national union must utilize its disciplinary powers in every situation in which a wildcat strike occurs would effectively destroy all union leadership at such times. This very real specter and and very important question it raises likewise raise a question the learned Court of Appeals refused to answer, as to whether the constitution of a national labor organization is a contract between it and each employer with whom any of its chartered local unions may contract.

The questions inherent in the imposition of liability upon the petitioner unions in this case are all questions of immense importance in the administration of federal labor law which should be settled by a clear decision from this Court not only for the guidance of all the courts of the land, but also so that national and international labor organizations may know the state of the law in order to determine whether they can safely intervene to endeavor to end strikes prohibited by local agreements.

Additionally, the decision of the learned Court of Appeals is contrary to well-considered decisions by the same Court, *Lewis v. Benedict Coal Co.*, 259 F.2d 346, and *Blue Diamond Coal Co. v. United Mine Workers of America*, 436 F.2d 551, in which a union was held not liable for spontaneous membership strikes not caused or supported by union representatives.

Juror Impartiality:

The decision of the learned Court of Appeals in refusing to order a new trial on the basis of incidents interfering with impartiality or demonstrating a lack of impartiality is contrary to the decision of the Court of Appeals for the Fifth Circuit in *United States v. Harry Barfield Co.*, 359 F.2d 120, and is contrary to the rationale of that same Court's decision in *Baker v. United States*, 156 F.2d 386. When it was not known by jurors until after commencement of the trial and after the Court had instructed jurors not to communicate with others, that the Respondent corporation was a subsidiary of Standard Oil Co. of Ohio, such facts strongly suggest that the juror communicated such information to her husband. When she sought out Respondent's executive immediately after the verdict, and asked for and received directions from him to aid her husband in obtaining employment from the parent corporation, she necessarily deliberated with intent to seek this favor. If her verdict had been against Standard Oil's subsidiary, she could hardly have felt as free to seek the aid of Respondent's executive.

With a second juror having been placed in obvious fear of being held in contempt of court for his tardiness the same morning he deliberated, it is respectfully submitted that to permit to stand a verdict by a jury, one-third of whose members were so contaminated, is a great departure from the accepted and usual course of judicial proceedings, where such great care is customarily taken to guard against factors affecting juror impartiality, and its sanction by the Court of Appeals calls for this Court's exercise of its supervisory power.

CONCLUSION

If the Court deem full briefing and oral argument of the case unjustified, it is nevertheless respectfully submitted that the judgments below should be reversed and the case be remanded for the grant of a stay pending arbitration, followed by a new trial, under the rationale of *International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.* 406 U.S. 487, and *Controlled Sanitation Corp. v. District 128, International Association of Machinists and Aerospace Workers,* 524 F.2d 1324, *certiorari denied,* — U.S. —, 96 S.Ct. 1114.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 75-1329

United States Court of Appeals
for the Sixth Circuit

Oxco Brush Division of Vistron Corporation, Plaintiff-Appellee, v. International Association of Machinists & Aerospace Workers, AFL-CIO, et al., Defendants-Appellants.	Appeal from the United States District Court, Middle District of Tennessee, Nashville Division.

Decided and Filed June 9, 1976

Before: Miller,* Lively and Engel, Circuit Judges.

Per Curiam. This is an appeal from a jury verdict awarding Oxco Brush Division of Vistron Corporation $60,000 in damages against defendant unions for violation of a no-strike clause of a collective bargaining agreement. The action was brought under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. The ensuing judgment was rendered against all three defendants named in

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* The Honorable William E. Miller, Circuit Judge, died on April 12, 1976 and did not participate in this decision.

the complaint, the Grand Lodge of the International Association of Machinists and Aerospace Workers, District Lodge 169 of the I.A.M. and Local Lodge 2369 of the I.A.M.

During the week ending on May 5, 1972, several employees of Oxco at plaintiff's Cookeville, Tennessee plant left work to vote in a Presidential primary election. A dispute arose as to whether permission was required for the employee absence. Oxco issued warning letters to the employees involved. On Friday morning, May 5, at 11:00 a.m., Jimmy Gaunce, District Lodge representative for the Union, requested a meeting with Terry Schreiner, plaintiff's plant manager to talk about the company's policy of leave of absence and other grievances. The meeting was attended by members of the Local Lodge's grievance committee. The Union representative warned the management that there was "potential trouble". The meeting ended approximately at noon without resolution of the difficulties. At approximately 12:25 p.m., the majority of the hourly employees who were represented by the Local Lodge began walking out of the plant. Approximately 161 employees left, while 54 remained to work out the remainder of the Friday shift. All of the local union officers participated in the walkout.

An afternoon meeting was arranged between Gaunce and Schreiner to discuss the situation. Schreiner's position was that the employees were to return to work and proceed through the arbitration procedure. Gaunce requested that the company make certain concessions or commitments to cool the employees' anger and defuse the controversy.

Schreiner contacted Mr. H. A. McClendon, the union's Grand Lodge representative, on Saturday, May 6, 1972. McClendon attended a meeting Monday afternoon, May 8 and requested that the company present written solutions to the employee grievances. Mr. McClendon also attempted to give the company's representatives the employees' perspective of the problems. Mr. McClendon advised the local union representatives that they should try to get the employees back to work; however, he made no individual contact with any of the employees.

On Tuesday, May 9 plaintiff sought and obtained a temporary restraining order from the district court enjoining the Union and the employees from continuing the walkout and ordering them to return to work. A copy of the restraining order was mailed to all employees. Further attempts were made to resolve differences culminating in a written statement by the company promising no disciplinary action if the employees returned by Wednesday, May 17. All employees had returned by May 16 to the plant. There is no evidence in the record that the strike was marred by any type of violence.

The parties stipulated in district court that "A strike or work stoppage occurred at the plaintiff's plant at Cookeville, Tennessee, at approximately 12:30 p.m. on Friday, May 5, 1972". The collective bargaining agreement executed between Oxco and the unions contained the following no-strike provision:

ARTICLE XIV

NO STRIKE OR LOCK-OUT

The Company, the Union and the employees all mutually agree that during the term of this Agreement there shall be no strikes, lockouts, slowdowns, or other interruptions of production.

Any employee who engages in a strike, slowdown or otherwise interrupts production shall be subject to disciplinary action or discharge without recourse to the grievance and arbitration provisions of this Agreement. However, if the Union alleges that an employee so disciplined or discharged

did not engage in such strike, slowdown or interruption of production, that fact only shall be subject to the grievance provisions of this Agreement.

The first contention by defendants on appeal is that the district court erred "by refusing to stay the action pending arbitration, where the union actually invoked arbitration, to determine the meaning of the no-strike clause under a mandatory no-strike provision providing a declaratory judgment type arbitration of any 'dispute between the Union and the Company regarding the proper interpretation' of any provisions of the agreement".

The district court denied stay of the action, holding that the employer did not have access to the grievance procedure. We agree. Whether the company was bound to arbitrate as well as what issues it must arbitrate is a matter to be determined by the district court. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). It is settled that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In *Atkinson v. Sinclair, supra*, the Supreme Court rejected the defendant unions' contention that plaintiff's claim for damages for a violation of a no-strike clause should be stayed pending arbitration. Under the terms of the grievance provisions in the collective bargaining agreement, it was clear that only the union or an employee could initiate a grievance. Similarly, here, Article IV of the collective bargaining agreement defines grievances as "differences, disputes, or complaints which an *employee or the Union may have against the company* concerning the interpretation, application, claim of breach or violation of this Agreement." (emphasis added.) It is therefore clear that an employer complaint cannot be processed through the grievance procedure. A contractual analysis also disposes of the unions ' contention that employer access to arbitration is irrelevant since the unions

have invoked the applicable provisions. The question is not one of "access" but rather instead whether the parties have bound themselves to arbitrate employer complaints.

The defendants also contend that prejudicial error occurred when the "court charged the jury that as a matter of law, the union was guilty of violating the contract, and the court reiterated this charge." This instruction, the defendants contend, was a "construction of the no-strike clause as being a no-fault guarantee that no strike will occur on the part of individual members or groups of individual members regardless of the lack of union involvement in the strike." Defendants' contention, however, is based on a factually inaccurate premise. At no point did the court instruct the jury that any of the three unions had breached the collective bargaining agreement. The court did state that because of the illegal work stoppage, the agreement had been breached; however, the breaching party was not indentified. Since the parties had stipulated that a strike or work stoppage had indeed occurred at the company's plant, at a minimum the employees were in breach of the no-strike covenant with the company and although not liable in damages, their discharge from employment would have been the employer's remedy for the breach. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 246 (1962); *NLRB v. Rockway News Supply Co.*, 345 U.S. 71, 80 (1953). While the language objected to could have been improved, we do not understand the district court's instructions viewed as a whole to indicate that the unions were automatically liable and are satisfied that the jury could not have been misled. Instead, we believe that the jury was bound to conclude from the court's instructions that for liability to attach to any one of the three union bodies a finding of ratification or authorization by that body was necessary. In the light of the evidence, defendants were entitled to no more.

Appellant's next contention is that the district court erred in refusing to instruct the jury that only the Local Lodge was a

party to the collective bargaining agreement and accordingly only the Local Lodge could be liable for any judgment. Without deciding whether only formal signatories to a collective bargaining agreement can be held liable for a breach of a no-strike clause, see *Blake Construction Co. v. Laborers' International Union*, 511 F.2d 324 (D.C. Cir. 1975), it is sufficient to say that the identity of the signatories to the collective bargaining agreement was ambiguous and the district court properly submitted the question to the jury. *Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276 (6th Cir. 1974), *cert. denied*, 419 U.S. 868 (1974); *Tennessee Consolidated Coal Co. v. U.M.W.*, 416 F. 2d 1192 (6th Cir. 1969), *cert. denied* 397 U.S. 964 (1970).

As to the propriety of the judgment of liability against the three union defendants, we find sufficient evidence in the record to support the jury conclusion that the three unions ratified or authorized the wildcat strike. We note initially that the parties consented to the following standard of liability:

> "Whether the defendants, Local Lodge, District Lodge and/or Grand Lodge ratified and condoned said strike through participation of their officers and agents, through inaction, or through their failure to exert all reasonable means to end such strike and, if so, whether either is rendered liable to the plaintiff for any damages suffered by it as a result of said strike?"

Thus the jury could find from the evidence that the Local Lodge could be held liable from the participation of the union officers in the walkout. Liability against the District Lodge could be asserted in light of the attempt by the District Lodge's representative, Mr. Gaunce, to obtain concessions from the company prior to the men returning to work. This rationale of course is also applicable to the Local Lodge. Liability against the Grand Lodge can also be based on the attempt to gain concession since the international's representative, Mr. McClendon,

requested that the company present written solutions to the employees' grievances.

A further basis of liability against the international union is the failure to take any steps to alleviate the problem. "Its inaction was a form of influence and persuasion". *Riverton Coal Co. v. U.M.W.*, 453 F. 2d 1035, 1042 (6th Cir.), *cert. denied* 407 U.S. 915 (1972). "By its silence and inaction the International . . . acquiesced in and condoned the illegal activity of the Local Union at a time when there was full opportunity to step in and prevent such activity". *Teamsters Local 984 v. Humko Co.*, 287 F. 2d 231, 242 (6th Cir.), *cert. denied*, 366 U.S. 962 (1961). The International Grand Lodge in the instant case had knowledge of the illegal strike since it sent a telegram to the Local Lodge instructing the members to return to work. However, the issuance of a telegram by itself is not sufficient action. *Riverton Coal Co. v. UMW, supra.* Rather the question is what action could the international union have pursued to end the strike. This court in the past has predicated liability against the international union on the finding of its dominance over the local as evinced by provisions of the union constitution. *Riverton Coal Co. v. UMW, supra; Teamsters Local 984 v. Humko Co., supra; Blue Diamond Coal Co. v. UMW*, 436 F. 2d 551 (6th Cir. 1970), *cert. denied*, 402 U.S. 930 (1971). In the instant case, the I.A.M. constitution Article XVII, § 2, line 33-39 states that the failure of a Local Lodge to receive sanction for a strike from the executive council of the international union "shall be considered sufficient cause for the suspension of any L.L. [local lodge] and the members thereof from all rights and privileges, at the option of the [Executive Council]". More generalized prohibitions against failure to perform any duty or obligation imposed by the constitution is found in Article I, §§ 1 and 3. Thus by the Grand Lodge's inaction when it clearly possessed the power to exact obedience to its directives and by perhaps the more stringent standard

agreed to by the parties, i.e., a breach of the duty to use *every* reasonable means to end the strike, the international's liability was supported amply by the evidence.

Appellants make numerous charges concerning the evidence admitted in the trial to prove damages. They claim particularly that the court erred in permitting the jury to award damages for loss of profit based upon proofs which they claim were speculative. Further, they claim that the district court erred in permitting the jury to include as damages the sum of $2,303 which Oxco paid for attorney fees to obtain the restraining order on May 9, 1972.

With respect to the evidence of loss of profits, suffice it to say that we find no error or abuse of discretion in the district court's admission of the challenged evidence. We believe that the district judge properly instructed the jury that it must find from a preponderance of the evidence the amount of fair compensation for the damage to the plaintiff's business and property which proximately resulted from the defendants' wrongful conduct. He further specifically instructed the jury that the damages may not be remote, speculative nor contingent, nor rest on surmise and conjecture, but must be reasonably inferable from the evidence presented.

It is true in § 301 actions as it is in contract law generally that once the fact is established that damages have been incurred "uncertainty as to their amount will not foreclose recovery." *Flame Coal Co. v. UMW*, 303 F. 2d 39, 44 (6th Cir.) *cert. denied*, 371 U.S. 891 (1962); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Proof of damages can only be as precise as the nature of the case will allow and we conclude from a review thereof and from the rulings of the district judge that the court did not err in its rulings on admissibility of evidence of damage, on the submission of the issues to the jury and upon its instructions with re-

spect to damages. Further, it is apparent that the award of $60,000 was well within the range of those proofs and we will not disturb it on appeal.

With respect to the allowance of the amount incurred in attorney fees for obtaining the temporary restraining order, we again conclude that the district court properly submitted this issue to the jury. We recognize that *Teamster Local v. Humko Co., supra*, relied upon by the plaintiff, involved attorney fees incurred in the removal of a picket line and hence an action under § 303, which specifically allows attorney fees as a proper item of recovery. Nevertheless the sum sought here was not for the prosecution of the case at bar, which could well be prohibited under the so-called American rule, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), but rather as a legitimate and necessary expense of mitigating the company's own loss and consequently the union's potential liability by taking effective steps to return the employees to work. In this respect, therefore, we find ourselves in agreement with Judge Maris and the Third Circuit in *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F. 2d 951 (3rd Cir. 1975), *cert. denied* 44 U.S.L.W. 3473 (1976) which allowed attorney fees in a § 301 suit.

Finally, defendants claim that they were deprived of a fair trial in seven specific particulars. These include requiring defendants to go to trial without the presence of the former president of the Local Union, requiring the counsel to come to the bench to make objections, actions of the court "to lead the jury to believe the court favored the plaintiff", and alleged misconduct of the court in placing a juror in fair by upbraiding him for reporting late for the trial on one occasion. A careful review of the entire transcript reveals that the trial was punctuated on several occasions by somewhat disagreeable exchanges between the court and defense counsel, some of which are difficult to understand upon the sterile record, and some of which appear

to have been prompted by an excess of theatrics by defense counsel. Viewed upon the record as a whole, we are unable to conclude that the claimed errors, to the extent that they may have existed, so impaired the integrity and overall fairness of the trial as to require reversal and a new trial.

Affirmed.

APPENDIX B

No. 75-1329

United States Court of Appeals
For the Sixth Circuit
Oxco Brush Division of Vistron Corporation,
Plaintiff-Appellee

v.

International Association of Machinists & Aerospace Workers, AFL-CIO, et al.,
Defendants-Appellants.

ORDER

Before: Celebrezze, Lively and Engel, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellants has been referred to a panel of the court. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

Entered by Order of the Court

/s/ JOHN D. HELMAN
Clerk

APPENDIX C

In the United States District Court for the
Middle District of Tennessee
Nashville Division

Oxco Brush Division, Vistron Corporation
Plaintiff,

v.

International Association of Machinists and Aerospace Workers, AFL-CIO, et al.,
Defendants.

Civil Action No. 6583.

MEMORANDUM DECISION AND ORDER

This cause came on to be heard this 25th day of March, 1974 before the Honorable L. Clure Morton, United States District Judge, upon the Defendants' Petition for a stay pending the submission of certain issues to arbitration under the provisions of the collective bargaining agreement between the parties. The Defendants have contended that the Plaintiff should be required to submit the issue of whether or not a breach of the no-strike clause of the agreement has been breached to arbitration before being permitted to proceed with this action. The Plaintiff contends that inasmuch as it had no access to the grievance procedure or to arbitration under the collective bargaining contract, it should not be compelled to arbitrate any issue before proceeding with its damage suit.

The Court has considered the applicable provisions of the collective bargaining contract and finds that the Plaintiff, in fact, did not have access to the grievance procedure inasmuch as

the grievance procedure was employee oriented. Accordingly, in accordance with the holdings in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962); *Firestone Tire and Rubber Co. v. United Rubber Workers*, 476 F.2d 603 (5th Cir. 1973); and *Boeing Co. v. United Auto Workers*, 370 F.2d 969 (3d Cir. 1967), the Petition for stay is herey denied.

/s/ L. CLURE MORTON
United States District Judge

APPENDIX D

United States District Court
For the Middle District of Tennessee
Nashville Division

Oxco Brush Division of Vistron Corporation,
v.
International Association of Machinists & Aerospace Workers, AFL-CIO, Et Al.
} Civil No. 6583

MEMORANDUM

Plaintiff, a manufacturer, was a party to a collective bargaining agreement dated July 8, 1971, which contained a "no strike" and "no interruption of work" clause. The employees were represented by the International Association of Machinists and Aerospace Workers (IAM).

Plaintiff brought suit against the Local Lodge No. 2369, the District Lodge No. 169, and the Grand Lodge of IAM for breach of contract pursuant to 29 U.S.C. § 185 following a "wild cat" strike.

On May 4, 1972, general unrest and dissatisfaction were manifested among plaintiff's non-supervisory employees following issuance of warning notices for unauthorized absence from work to a number of employees. As a result of the general unrest, officials of the Local Lodge advised the business representative of the District Lodge of the situation and arranged a meeting between management and several representatives of the union.

On May 5, 1972, a representative of the District Lodge met with a committee of the Local Lodge and reviewed a list of some eight or ten employee "grievances," that ranged from the warning notices issued on May 4th to various plant conditions.

Following the meeting between a representative of the District Lodge and the Local Lodge committee, the union representative proceeded to meet with management officials. The District Lodge representative presented the list of grievances discussed in the earlier union meeting. Plaintiff's representative took the position that any employee complaints should be processed through the grievance procedure established in the union contract of July 8, 1971. This meeting concluded around noon with no resolution of the "grievances." Within an hour a substantial number of employees left their work and, in effect, paralyzed plaintiff's manufacturing operation.

Several meetings between management and union representatives (including District Lodge and Grand Lodge representatives) were held in the course of the following week. Plaintiff also applied for a temporary restraining order, which the court granted, enjoining the work stoppage. The work stoppage concluded on May 14, 1972.

Plaintiff instituted this suit for damages attributable to breach of the union contract. The pre-trial order, which amended and superseded prior pleadings, set forth the following issues for determination:

1. Whether the no-strike clause is valid under § 7 of the Labor-Management Relations Act?

2. Whether the strike or work stoppage which occurred at the plaintiff's plant in Cookeville, Tennessee on May 5, 1972, was a breach of the collective bargaining contract between the parties and if so, by what defendant or defendants, and under what construction of the contract?

3. Whether the defendants, Local Lodge, District Lodge and/or Grand Lodge ratified and condoned said strike through participation of their officers and agents, through inaction, or through their failure to exert all reasonable means to end such strike[1] and, if so, whether either is rendered liable to the plaintiff for any damages suffered by it as a result of said strike?

4. Whether plaintiff condoned the strike by the manner of its settlement?[2]

5. Whether the plaintiff suffered any damages as a result of the work stoppage on May 5, 1972, and if so, whether the plaintiff is entitled to recover such damages which were incurred from the defendants, Local Lodge, District Lodge, and/or Grand Lodge?

The case was tried by a jury which rendered a verdict of $60,000 against the Local Lodge, District Lodge and the Grand Lodge. The cause is now before the court on motions for a new trial and judgment N.O.V. made on behalf of the defendants.

Motion for New Trial

1. The first ground is that the court was in error in forcing defendants to trial without the presence of the witness Pinkston, the president of the Local Lodge.

The amended complaint seeking damages was filed on May 12, 1972. Answer was filed on September 21, 1972. By notice dated October 30, 1972, the trial date was April 23, 1973.

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[1] The parties consented to this standard for determining liability in this cause and it is the standard referred to subsequently in this Memorandum.

[2] This issue refers to an agreement executed by management and union representatives on May 14, 1972.

On request, the trial date was delayed until June 23, 1973. It was again delayed until September 10, 1973. On August 31, 1973, defendants filed a motion to reset the case. It was reset to October 11, 1973. Once again this case was reset to March 25, 1974. On that occasion, during the course of the trial, a mistrial was declared. By notice dated April 4, 1974, the case was again set for trial on August 27, 1972.

On the morning of the trial, August 27, 1974, the defendants moved for a continuance due to the absence and unavailability of Mr. Pinkston as a witness. Mr. Pinkston had been the president of the defendant Local Lodge during the work stoppage. A subpoena for service on Pinkston had been delivered to the United States Marshal within the time prescribed by the court, i.e., five days excluding Saturdays, Sundays and holidays before trial. This time period is established so as to allow sufficient time for the marshals to proceed to the address furnished by the subpoening party to effect service. However, Mr. Pinkston had obtained employment outside the jurisdiction of the court and could not be served.

No proof was introduced or tendered by defendants that the witness was notified at any time between April 4, 1974, and August 27, 1974, of the date of trial. Nor was any contention made that efforts to contact this witness were undertaken within 30 days of trial. Basically, the defendants apparently contended that if a subpoena was placed with the U. S. Marshal before trial, then their responsibility had been discharged.

Based on this theory, a court might never be able to try a case. The responsibility of the attorneys and their clients to locate their witnesses, especially a purported principal witness, keep in contact with their witnesses and prepare their case cannot be evaded by the ministerial act of preparing a subpoena.

The defendants demanded a jury trial. The jury panel was present, other litigants had been deprived of their opportunity

for a trial on the date in question, and there appeared no excuse for defendants' failure to attempt to locate their former officer and witness within a reasonable time in advance of trial.

Furthermore, this witness had been deposed and his deposition was in fact read to the jury.

The motion for a continuance was denied which is now assigned as a basis for a new trial. This basis is without merit and is rejected.

2. Defendants assert six grounds for new trial that deal with the court's charge to the jury. Several of the assertions are redundant and the court will not necessarily discuss the issues in the order proposed by defendants.

Error is initially claimed in that the court charged the jury that the collective bargaining agreement had been breached and that the jury's task was to determine what liability, if any, attached to the various defendants as a result of the breach.

In charging that the contract had been breached, the court considered the specific language of the contract. Article XIV of the collective bargaining agreement provides:

> NO STRIKE OR LOCK-OUT. The Company, the Union and the employees all mutually agree that during the term of this Agreement there shall be no strikes, lockouts, slowdowns, or other interruptions of production.
>
> Any employee who engages in a strike, slowdown or otherwise interrupts production shall be subject to disciplinary action or discharge without recourse to the grievance and arbitration provisions of this Agreement. However, if the Union alleges that an employee so disciplined or discharged did not engage in such strike, slowdown or interruption of production, that fact only shall be subject to the grievance provisions of this Agreement.

By the terms of this agreement, the Union and the employees promised there would be no strike or "other interruptions of production." The parties stipulated the work stoppage did, in fact, interrupt production at plaintiff's manufacturing plant. In light of the language employed in the above quoted clause, it is significant to note that this is not a clause wherein the Union promised that "it" would not engage in any work stoppage. To the contrary, by the terms of this clause, the Union promised there would be no work stoppage. While this type promise may not be the usual promise in labor-management agreements, it is, nonetheless, the promise made in this case. When the work stoppage occurred, the contract had been breached. Therefore, the proper issue before the jury, and the issue addressed in the court's charge, concerned the question of liability, if any, on the part of defendants.[3]

In assessing the question of liability, the jury was instructed that two determinations were necessary: 1) who was bound by, or a party to, the contract, and 2) had one or more of the defendants either participated in, authorized, condoned, or ratified the illegal work stoppage or its continuance.

The Grand and District Lodges asserted they were not parties to the collective bargaining agreement and therefore, could not incur liability for breach of contract. In light of the verdict in this cause, it appears that the jury concluded the Grand and District Lodges were bound by the agreement. The Grand and District Lodges now contend that the court erred in allowing the jury to construe the collective bargaining agreement. With reference to contract construction, the court charged the jury as follows:

> . . . [T]he question has arisen as to who is a party to that contract and what the purposes of the contract are.

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[3] The instant contract did not contain a clause limiting union liability or holding the union harmless for "unauthorized acts."

The jury has the duty to reasonably construe the language of the contract, but it should not go beyond this duty of reasonable construction and emasculate the contract.

The proper approach is to attempt to arrive at the real intention of the parties in the light of the language used and in view of the subject matter and circumstances concerning the execution of the contract. You read it, you construe it and you determine the identity of the parties to the contract and its purpose.

In considering the contract, you may consider the object and intent of the parties, the nature and subject matter, the relationship of the parties to each other and the objects to be accomplished, the motives which induced the contract and the objects and purposes to be effected thereby may be considered in ascertaining the intention of the parties. The whole contract should be considered in making this determination.

Considering the proof adduced in this cause, the court is of the opinion that error, if any, on this question is confined to its failure to charge, as a matter of law, that the Local Lodge was the agent for the Grand Lodge and District Lodge in the execution of the agreement and that all defendant lodges were bound by the agreement. The effect of such possible error is nullified by the jury's verdict.

The history of the collective bargaining agreement between plaintiff and the Union is pertinent. On January 16, 1969, the National Labor Relations Board certified District Lodge No. 169 of the IAM as the collective bargaining representative of plaintiff's employees. Thereafter, Local Lodge No. 2369 of the IAM came into existence. A contract was executed and its preamble states:

> This agreement is made and entered into this the 8th day of July, 1971, by and between the Oxco Brush Division

> of Vistron Corporation, located at Cookeville, Tennessee, hereinafter called the "Company" and the International Association of Machinists and Aerospace Workers, Local Lodge 2369, affiliated with District Lodge 169, AFL-CIO, hereafter called the "Union."

The signatures to the contract, as to the Union, are as follows:

> "For the Union:
>
> International Association of Machinists
> and Aerospace Workers,
> AFL-CIO
> Jimmie Gaunce
> Howard Carmack
> Joe Scott
> Wayne Johnson
> Sammy Thomas"

Jimmie Gaunce was and is the business representative of District Lodge No. 169. The other four signing individuals were negotiators for Local Lodge No. 2369.

The structure of the IAM is pyramidal in nature. The Grand Lodge is at the top of the cone and has geographic jurisdiction for the entire United States of America. At that next lower level is found the District Lodge. A district lodge has such geographic jurisdiction as designated by the Grand Lodge, usually encompassing several local lodges. Under a district lodge is a local lodge. The local lodges comprise the lowest level within the IAM and it is at this level that workers have a direct affiliation with the Union.

The proof shows that Local No. 2369 was issued a charter by the IAM sometime after January 16, 1969. Although this charter was not made a part of the evidence, the constitution of the IAM is in evidence and the relationship between the Grand Lodge and the district and local lodges is carefully de-

tailed. A review of the constitution readily illustrates the extensive control of the Grand Lodge over the operation and affairs of subordinate organizational units. The control of the Grand Lodge over a local lodge is reflected in the summary of the IAM constitution presented in Appendix A.

Basically, the only restrictions placed on the Grand Lodge in its dealings with a local lodge are those mandated by 29 U.S.C. § 401, *et seq.*, with particular reference to § 411.

Under this structure this international union, an unincorporated association, operates through two direct arms, the district lodges and the local lodges. These arms, to the extent that they have individual identities, are unincorporated associations.

It is readily apparent from the enumerated items in Appendix A that the Grand Lodge (the parent) has domination, supervision and control of the district lodges and the local lodges. Every action of a local lodge, except administrative procedures, must have prior approval of the Grand Lodge. Even the administrative procedures of a local lodge are substantially prescribed by the Grand Lodge. A local lodge has no independent discretion as to any matter except the date of its monthly meeting and whether it will have one or two regular meetings each month.

The most apt legal description of the relationship between the Grand Lodge and a local lodge is that the local is the disclosed agent of the Grand Lodge. See *Riverton Coal Company v. United Mine Workers of America*, 453 F.2d 1042 (6th Cir. 1972); *Local Union 984, Int. Bro. of Teamsters v. Humko Co.*, 287 F.2d 231, 242 (6th Cir. 1961); *Lewis v. Benedict Coal Corporation*, 259 F.2d 346, 351 (6th Cir. 1958).

The existence of an agency relationship between the IAM's Grand Lodge and Local No. 2369 is not the determinative issue

in this cause. Congress has expressly limited the application of common law agency rules in labor cases and the mere existence of agency is not conclusive of liability. E.g., as to unlawful acts of union officers, members and agents, see: 29 U.S.C. §106; as to limitation of liability on the part of individual union members for money damages in suits for breach of collective bargaining agreements, see: 29 U.S.C. §185(b). However, these limitations do not preclude the application of agency principles in every situation. Congress has recognized that in suits between employers and unions the usual principles of agency are pertinent. See: 29 U.S.C. § 185(e); legislative history, *U.S. Code & Cong. Service*, 1947, p. 1172; *United Mine Workers v. Gibbs*, 383 U.S. 715, 16 L.Ed.2d 218, 865 S.Ct. 1130 (1966).

Thus, even if an agency relationship is found to exist between the Grand Lodge and the Local Lodge, it must further appear that the various union entities (the Grand Lodge, the District Lodge, and/or the Local Lodge) authorized, adopted or ratified the breach of the "no strike" clause in this collective bargaining agreement. See *Blue Diamond Coal Co. v. United Mine Workers of America*, 436 F.2d 551 (6th Cir. 1970), *cert. denied*, 402 U.S. 930 (1971); *Lewis v. Benedict Coal Corp., supra; Garmeada Coal Co. v. International Union, United Mine Workers of America*, 230 F.2d 945 (6th Cir. 1956); *North American Coal Corp. v. Local 2262, United Mine Workers of America*, 497 F.2d 459 (6th Cir. 1974).

The determinative issue in this cause relating to liability is whether any or all of the defendants "participated in, authorized, ratified or condoned"[4] the work stoppage. In that respect the court charged the jury as follows:

> To establish liability on the local or if you find that the local was the agent of either the district lodge or the grand

[4] In the pre-trial order, the parties agreed to this standard. See discussion of the pre-trial order, *supra*.

lodge, it must appear that the union body participated in, authorized, ratified or otherwise engaged in the conduct which resulted in the breach of the contract.

In making this determination, you must look to all of the facts and circumstances surrounding the entire incident from its inception to its conclusion.

You may consider, among other things, and this is not limited, you may consider all of the evidence you heard, but you may consider, among other things: (1) participation in the strike by the officers of the union; (2) the taking or failure to take affirmative action to prevent or terminate the work stoppage; (3) whether any activities taken were taken in good faith or were only the giving of token lip service; (4) whether there was any disciplinary action permissible, authorized by the constitution, taken or threatened; (5) if none were taken or threatened, was such—and if they were authorized by the constitution, was such lack thereof due to expertise and experience applied by the union officers to the situation in existence; (6) whether such inaction was a form of influence and persuasion to continue the work stoppage; (7) whether the actions of the union representatives in their conferences with the company officials were an effort to by-pass the grievance procedures and use work stoppage as a means of obtaining a concession, or whether on the other hand such activities were made in good faith based upon expertise and experience in an effort solely to reduce friction between the company and the employees in an effort to get the employees back to work; (8) whether it is realistic to believe that there was a spontaneous mass exodus from the plant with no leadership; if there was such leadership, what was the identity thereof?

The foregoing charge does not limit the scope of the jury's consideration of various factors relating to liability for breach

of the no strike clause. The charge is not overly restrictive and counsel for defendants fails to establish a legal basis for the invalidity of the enumerated factors as they relate to the issue of ratification, authorization, condonation, etc. See *Blue Diamond Coal Co. v. United Mine Workers of America, supra.*

Immediately following the portion of the charge just quoted, the court further instructed the jury concerning the standard to be applied in determining what, if any, liability was incurred by one or more of the defendants. The court addressed the issue of liability as follows:

> . . . Since there is no liability imposed upon the employees who illegally strike, a union, or a district or a grand lodge are not automatically liable therefor.
>
> To establish liability, as I told you before, you must find that the local union participated in, authorized, ratified or engaged in conduct which resulted in the breach or the continuance thereof.
>
> To go further, once you find that . . . if you find that the local union was liable, then you must go one step further as far as the district union is concerned. You must either find that the district union had authorized the strike or that the district union had participated in, condoned or ratified it through its activity or inactivity. And then, if you find the local union is liable, then you must go further before you find that the grand lodge is liable and find that the grand lodge either participated in, authorized, condoned, ratified in either the illegal work stoppage or its continuance.

The court is of the opinion that the jury charge fairly presented the issue of liability and as noted in the discussion of defendants' motion for judgment N.O.V., *infra,* there was sufficient evidence to raise an issue of fact as to whether there

had been participation in, ratification or condonation of the illegal strike.

It appears to the court that defendants' motion for a new trial based on the jury charge is without foundation and must be rejected.

3. The next assignment of error involves the exclusion by the court of an arbitration award resulting from a grievance filed by Mr. Pinkston, the President of the Local Lodge, because of his suspension by plaintiff after the work stoppage was terminated. The sole issue before the arbitrator was whether Mr. Pinkston led the strike and urged other employees to cease working.

The court ruled that the arbitration award should not be admitted because it invaded the province of the jury. Also, the issue in the arbitration proceeding was limited to the question of the active leadership and direct precipitation of the strike. The arbitration issue was very narrow, while the issue at trial was broadly drawn to encompass action and inaction of the union and all of its officers in terminating the strike. Further, the court is of the opinion that admission of the arbitration award would have been highly prejudicial and could have convinced the jury that the factual issues presented in the instant case had been previously determined when, in fact, they had not been determined. This contention is rejected.

4. The next ground for a new trial involved the admission into evidence of a computer listing of decrease in sales following the strike as compared to a similar time period for the previous year.

An employee of the plaintiff, who was properly qualified as an expert, was permitted to give his opinion as to whether delays in production and shipment of merchandise due to the work stoppage in question had any relationship to the lost sales.

The method of compilation of the exhibit, what it reflected and the opinions of the expert were subjected to rigid cross-examination.

The court concluded and now concludes that the objection is not well taken since it, in effect, attacks the weight to be given such testimony and not its admissibility.

5. The next issue raised in the motion concerns the admissibility of certain evidence to establish damages suffered as a result of the strike.

In addition to the opinion evidence referred to hereinbefore, the plaintiff introduced evidence as follows:

(a) cost of emergency operation during the strike	$ 5,269.00
(b) fixed cost of plaintiff's operation during strike	38,622.00
(c) catch-up overtime worked after strike settled	37,306.00
(d) incidental costs	1,570.00

The jury verdict was $60,000.00. It was less than out-of-pocket expenses. The jury apparently was not enchanted with plaintiff's loss of profit theory.

Based on the teachings of *Blue Diamond Coal Co. v. United Mine Workers of America, supra,* the court finds that the jury verdict was not excessive and was not based on "sheer speculation and guess work."

6. The various other allegations of error contained in defendants' "shotgun" type motion for new trial are not meritorious and will not be discussed separately.

Judgment N.O.V.

Motions for judgment notwithstanding the verdict have been filed on behalf of each defendant. Initially, the court notes that motions on behalf of the individual strikers are not well taken since the individual members of the union organization were not parties to the suit and the judgment is not against the individual members.

The standard for liability on the part of the local district and grand lodges has been discussed in some detail above. As charged to the jury, a finding of participation, ratification or condonation on the part of one or more of the defendants was necessary before a money judgment could be awarded. After review of the record in this cause and having the official court reporter reread the transcript, the court is convinced that sufficient evidence was adduced on the issue of participation, ratification or condonation to merit submission of the dispute to the jury.

The court is mindful that the test for the propriety of granting a judgment notwithstanding the verdict is the same as that which governs a motion for directed verdict "since the motion for judgment notwithstanding the verdict merely renews an earlier motion for a directed verdict." *Minton v. The Southern Railway Co.*, 368 F.2d 720 (6th Cir. 1966). The test is whether in this case, considering the evidence in its most favorable light for plaintiff and giving to plaintiff's evidence all the fair value to which it is reasonably entitled and indulging every reasonable inference favorable to plaintiff, there is evidence of sufficient substantiality and probative value from which the jury might rationally find a verdict in favor of plaintiff. *Moore's Federal Practice* §50.07; *Wright & Miller Practice & Procedure* §2524; *Massey v. F. H. McGray Co.*, 233 F.2d 905 (6th Cir. 1956). In light of the evidence properly before the jury in this cause, the court cannot grant the motion on behalf of any defendant.

The legal status of defendants does not preclude the finding of participation, ratification, or condonation which is the basis of liability. Also, the fact that an officer of the Grand Lodge sent a telegram to the President of the Local Lodge advising that the strike violated the contract and that the workers return to their jobs does not preclude liability. The fact might be of some weight or significance in reaching a decision on condonation, etc., but it is not conclusive as a matter of law. *Riverton Coal Co. v. United Mine Workers*, 453 F.2d 1035 (6th Cir. 1972); *Blue Diamond Coal Co. v. United Workers, supra*. The telegram is not the only evidence relevant to the issue of condonation on the part of the Grand and/or District lodges.

It is finally asserted that the agreement of Sunday, May 14, 1972, signed by the plant manager precludes the instant suit. The court finds no basis for the conclusion that the agreement bars a suit for damages incurred as a result of the illegal strike. The document does not purport to waive claims against the union for damages and the court finds no basis for such implication. The agreement did provide that individual disciplinary actions would not be taken, even though the strikers were subject to a five day work suspension for the unauthorized absence. The Local's President was excepted from the agreement and a grievance concerning the president was submitted to arbitration. The arbitration award does not bar this action and did not address the issues of participation, ratification or condonation. See point three, *supra*, under the court's discussion of the new trial motion.

The court concludes that under the law and the facts, the verdict must stand and defendants' motions for new trial and judgment notwithstanding the verdict must be denied.

An appropriate order will be entered.

/s/ L. CLURE MORTON
United States District Judge

APPENDIX A

The following summary is based on the IAM constitution and illustrates the extensive control of the Grand Lodge over a local lodge:

1. The Grand Lodge (GL) has power to grant charters for the purpose of organizing, supervising, controlling and generally directing local lodges (LL's) and district lodges (DL's).

2. The government and superintendence of all LL's and DL's is vested in the GL and the GL is accorded the status of "supreme head of all such lodges under its jurisdiction."

3. Every member, officer, LL and DL is obligated to comply with the lawful decisions of the GL officers.

4. The bylaws of a LL do not become effective until they are submitted to the International President (IP) for his revision and approval.

5. The Executive Council (EC) of the GL has the power to require reports from any officer of a LL or DL. The EC also has the power to suspend and/or remove any LL or DL officer for cause.

6. The IP is vested with power to direct and supervise all LL's and DL's. The IP also has "full authority to suspend LL's and DL's" as well as LL and DL officers "charged with incompetency, negligence, insubordination, [or] failure of duty . . . pending a final disposition of such charges."

7. Subject to the approval of the EC, the IP has the power to assume direct control of a LL or DL when, in his opinion, "a LL [or] DL . . . is violating the constitution of the GL or otherwise jeopardizing the welfare of the membership . . ."

8. Dues and per capita taxes are assessed by the GL and collected from the LL based on a "per member assessment."

9. The books of a LL are subject to audit at the will of the GL.

10. The GL requires that officers of all LL's and DL's be bonded. The GL establishes the minimum amount of bond, selects the bonding company and the cost thereof is assessed to the LL or DL.

11. The EC has the power to approve or disapprove determinations as to the number of business representatives necessary to service the membership of LL's and DL's. If, in the opinion of the EC, proper servicing is not accomplished, then the Council has the power to order consolidation of small LL's. The EC also has the power to order the establishment of business agencies where a LL or DL fails to do so.

12. Prior approval of the EC must be obtained before an "authorized" strike may be declared by a LL or the LL membership.

13. If a strike vote is taken by the membership of a LL based on grievances associated with conditions of employment, and the EC declines to sanction the strike, then the grievance must be declared at an end. Should the LL then fail to declare the grievance at an end, the EC has the power to suspend the LL and its members "from all rights and privileges."

14. The EC has the power to order striking members to return to work when it determines that the continuance of a strike is "unwise."

15. The EC has the power to order certain members to cease work pending resolution of an "unfair work" grievance.

16. The conduct of LL meetings must be in compliance with the rules of order established by the GL.

17. The order of business, or format, for LL meetings is established by the GL.

18. A local lodge may not issue a general appeal for financial assistance to other LL's without prior approval by the IP. If the IP approves a general appeal for financial assistance, then contributions or funds of any type must pass through the coffers of the GL.

19. Should a LL cease to function, its funds and property become the property of the GL.

20. The GL establishes the minimum monthly dues to be paid by the members of a LL.

21. The DL's have "authority and control over all LL's within their jurisdiction." However, the DL's powers to assert "authority and control" over LL's are subject to approval of the GL.

22. The jurisdiction of all DL's is determined and defined by the GL.

23. The LL's must affiliate with the DL having jurisdiction unless the EC grants an exemption.

APPENDIX E

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 29, United States Code, Section 164(b)

* * * * * * *

(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Title 29, United States Code, Section 411(a)(5)

* * * * * * *

(5) **Safeguards against improper disciplinary action**.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

* * * * * * *

Title 29, United States Code, Section 462

* * * * * * *

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

* * * * * * *

Title 29, United States Code, Sec. 464(c)

* * * * * * *

(c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462 of this title. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 462 of this title. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

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Tennessee Code Annotated, Sections 50-208—50-210

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50-208. Denial of employment because of affiliation or nonaffiliation with labor union unlawful.—It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind.

50.209. Contracting for exclusion from employment because of affiliation or nonaffiliation with labor union unlawful.—It shall be unlawful for any person, firm, corporation or association of any kind to enter into any contract, combination or agreement, written or oral, providing for exclusion from employment of any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind.

* * * * * * *

50-210. Exclusion from employment for payment of or failure to pay union dues unlawful.—It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure to pay dues, fees, assessments, or other charges to any labor union or employee organization of any kind.

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